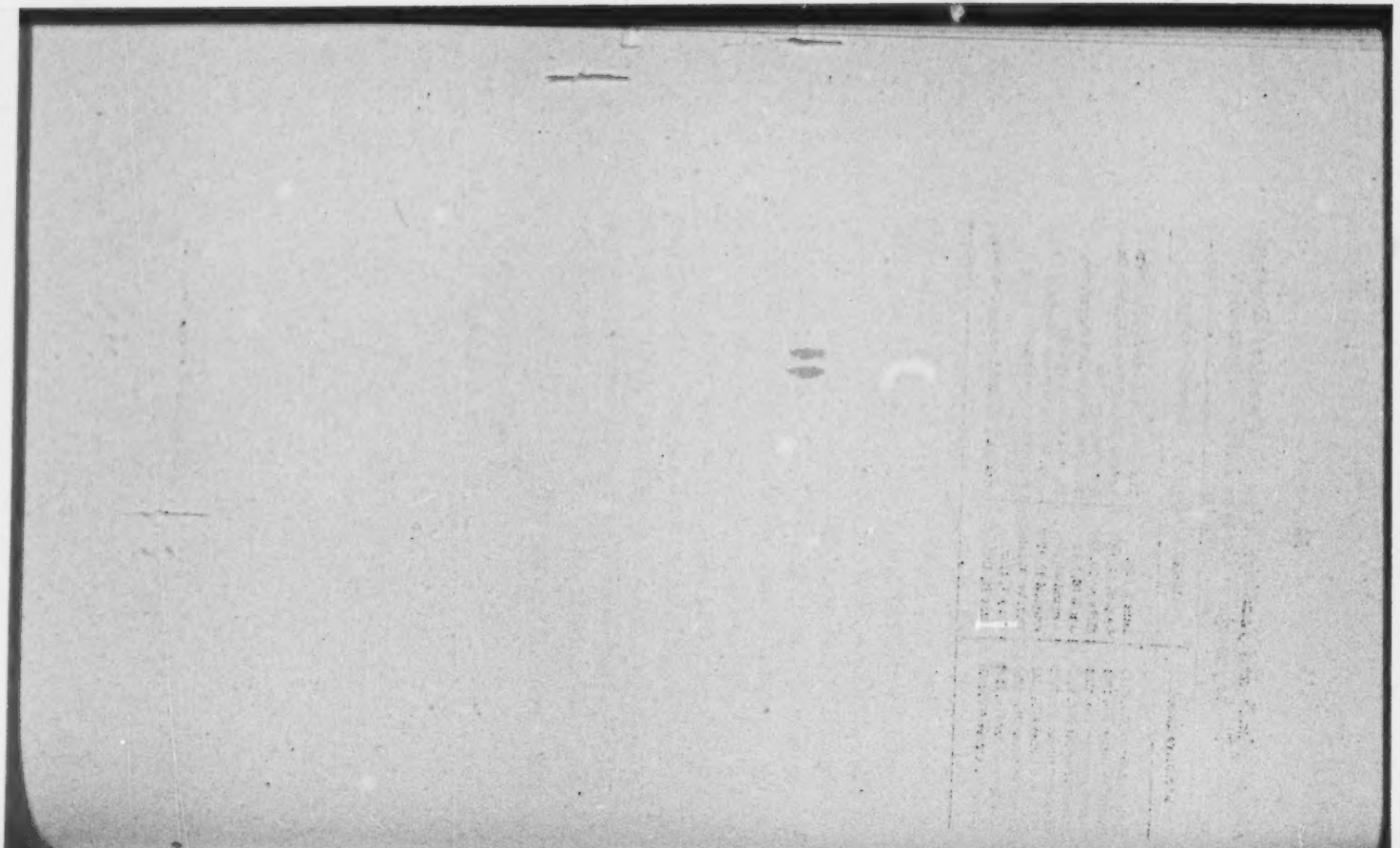

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 949

UNITED STATES,

Petitioner,

vs.

MONTGOMERY WARD & COMPANY, ET AL.

Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

STUART S. BALL,
JOHN A. BARR,
HAROLD A. SMITH,
GUY A. GLADSON,
ARTHUR D. WELTON,
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For Respondents.

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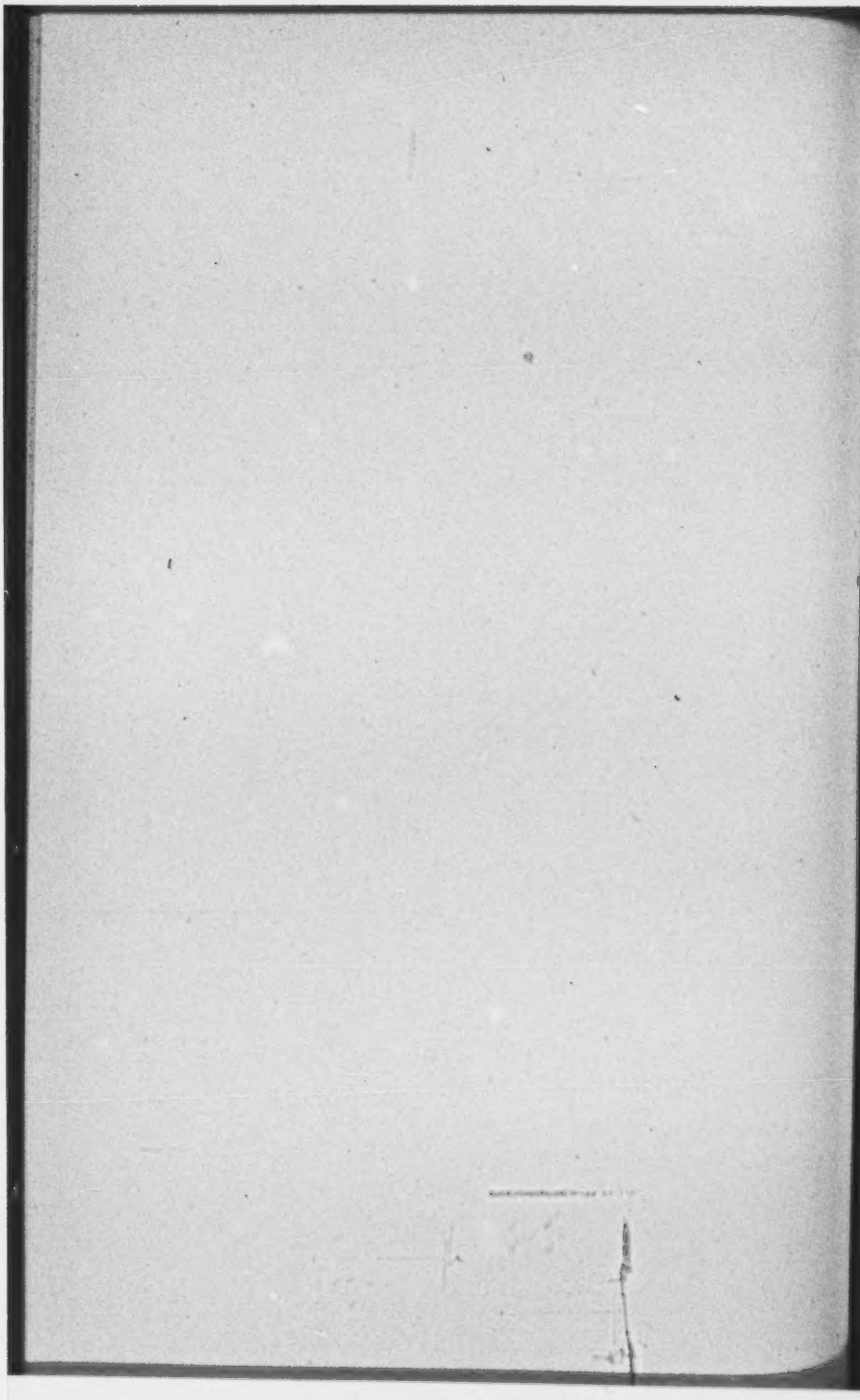

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UNITED STATES,

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vs.

MONTGOMERY WARD & COMPANY, ET AL.

Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

The District Court held that the seizure by the Army, acting under an executive order of the President, of certain retail properties of Montgomery Ward & Co. was neither authorized by the War Labor Disputes Act nor within the constitutional powers of the President as Commander in Chief of the Army and Navy (R. 719, 725).

The Respondents submit that the judgment of the District Court is clearly right. An analysis of the Government's position and of the reasons advanced in the executive order as a justification for the seizure, together with a correction of inaccuracies and omissions in the Petition for Certiorari, is necessary to a clear understanding of the question at bar.

I. The Petition Misstates the Issues When It Implies That the Decision Below Strips From "The Government" the Power to Deal With War Time Labor Disputes.

The denial by the District Court of the validity of the President's order of seizure is in no sense a challenge to the "war power" of the United States. Unquestionably the Government possesses whatever power may be necessary to wage war successfully. The question in this case is not whether the power of seizure may be within the scope of the "war power", but whether the power of seizure was in this instance invoked in the manner set forth in the constitution.

The President of the United States and "the Government" are not synonymous terms. The duty of the President is to exercise command of the armed forces of the nation and to execute the laws which Congress has enacted to aid in the prosecution of the war. Except for his authority as a military leader, the Congress must first legislate before the President can act. It is Congress which must decide the extent to which the President may wield the "war power" inherent in the sovereign United States.

The questions in the present case are whether Congress authorized, as a war measure, the seizure of the retail properties of Montgomery Ward & Co., or whether the President's power as a military leader entitled him to order the seizure of those properties without awaiting the passage of a law by Congress.

The petition for certiorari makes the somewhat emotional and altogether incorrect statement that

> "unless the decision of the District Court is reversed the Government * * * would stand stripped of power to deal with consequences which might develop into the most serious crisis in the history of the war * * *." (Petition, p. 13.)

Since the opinion below expressly affirms (R. 712) the constitutional power of the Government to order the settlement of war time labor disputes and to take such steps as the seizure of property to enforce industrial peace, "the Government" has in no sense been stripped of its power to deal with any crisis that may arise.

The Petition further asserts (p. 15) that an essential issue in the case is "whether the case presents a proper application of the war time powers of the Congress *and* President." Only war time powers of the President acting alone are in issue; those of the Congress are not questioned.

The position of the Respondents and of the District Court is simply this: First, Congress has never authorized the seizure of Wards' retail properties. Second, the President as Commander in Chief has no inherent military authority to seize private property not even remotely connected with actual warfare, not devoted to the production of implements of war, and not needed or taken for the purpose of supplying any want of the armed forces of which he is the constitutional leader.

II. The Petition Omits or Misstates Many Important Facts.

While mentioning (p. 6) that Wards owns three factories, the Petition omits to point out that none of them were covered directly or indirectly by the order of seizure (R. 341-343).

While asserting (p. 9) that "Ward has consistently refused to abide by the directives" of the War Labor Board, the Petition omits to point out that Wards' refusal has been based upon its belief that the Board in issuing those directives violated the War Labor Disputes Act, and that Ward filed suit in the District Court of the District of

Columbia to establish the illegality of those orders (R. 305-306, 308-309, 311, 312).

While asserting (p. 14) that the question of the President's power is of "immediate importance", the Petition omits to state that non-compliance with Board orders was announced by Wards when it filed its suit against the War Labor Board on October 5, 1943 (R. 305), more than a year before the order of seizure was issued. The order of seizure was not the result of any sudden or unanticipated emergency.

The facts referred to in the Petition must be read with the following points in mind:

The seizure of Wards' property was not a requisition by the President for the purpose of supplying the armed forces of the United States with any materials.

The seizure was not an impressment of Wards' properties or business for the actual use of the United States in the conduct of the war or for the purpose of equipping the armed forces either at home or abroad.

No claim is made that the President acted under any of the statutes authorizing requisition of necessary supplies or the condemnation of property for public use except insofar as reliance is placed on Section 3 of the War Labor Disputes Act.

No claim is made that Wards has ever refused to sell to the Government any article which Wards had available, or that Wards has ever refused the use of its properties for military purposes.

No claim is made that any of the seized properties are equipped or engaged in manufacturing anything.

No showing was made that any labor dispute or disturbance in any of the seized properties has resulted in a failure to deliver goods to the United States or to any

contractor engaged in the production of any article or material for the United States.

No showing was made that the seizure was necessary for, or a part of, any military campaign or operation. The Executive Order does not recite nor purport to find that the seizure was necessary for military purposes. No attempt was made to show even a remote connection with any operation of the armed forces.

None of the affidavits, not even those of Messrs. Byrnes, Vinson, Davis, Patterson or Bard, establish any sudden military emergency that called for the action of the President before he had an opportunity to seek the necessary grant of power from Congress.

Finally, no claim is made that Wards has violated any law in handling its labor disputes or in refusing to adopt the directives of the War Labor Board.

The Petition and the petitioner's affidavits demonstrate conclusively that the real reason for the seizure was the unwillingness of Wards to abide by directives of the War Labor Board which Wards believed to be illegal. Since War Labor Board directives are, as the District Court pointed out, "admittedly only advisory" (R. 720), Wards stands before this Court deprived of its properties and ousted from its business by force because it refused to accept "advice" which it regarded as improper and as an infringement of its rights.

III. The Only Possible Question of Statutory Construction Is Whether the Retail Properties of Montgomery Ward Were Equipped for "Manufacture, Production or Mining" of War Materials and Hence Subject to Seizure Under Section 3 of the War Labor Disputes Act.

The grant of power of summary seizure of private property must be found, even in time of war, in clear and explicit language:

> "We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizens than was clearly and unmistakably indicated by the language they used." *Ex parte Mitsuye Endo* (Dec. 18, 1944) ..... U. S. ....., 65 Sup. Ct. (Adv. sheets) 208 at p. 217.

The Petition half-heartedly contends (pp. 16-20) that even retail establishments are plants "equipped for the manufacture, production or mining of articles or materials" necessary to or useful in the war effort, and thus subject to seizure under Section 3. The Petition contends (p. 17) that Congress used the word "production" in that section to include "all steps in the preparation, construction, assembly, maintenance, storage, repair, distribution, and making available of articles or materials."

If "production" includes every step in making available any articles which may be useful in supporting the civilian economy in time of war, then "production" includes practically the sum total of economic activities. If this definition is correct, Congress has authorized the seizure not only of factories and mines, but of corner grocery stores, neighborhood drug stores, garages, filling stations, and meat markets. Every one of those businesses would be a plant equipped for "production" under the definition of that word which the Petition advances.

Congress obviously did not intend to make such an inclusive grant of power. The word "production" is not given any "artificial definition" in the War Labor Disputes Act which would enlarge its meaning beyond that accorded it in ordinary speech (cf. *Western Union Telegraph Company* v. *Lenroot*, Jan. 8, 1945, ... U. S. ....., 65 Sup. Ct. (adv. sheets) 335, 342). The context shows that the word is not used in some special economic sense. The Congress, therefore, must have intended the word to be given its ordinary meaning.

The dictionaries define "production" as the "act or process of producing", and define the verb "to produce" as "to give being or form to; to manufacture; make,": Webster's *New International Dictionary*, 2nd Edition, Unabridged. In the absence of some artificial statutory definition the cases uniformly regard the "production" of articles and materials as the bringing of those articles and materials into existence. "Production connotes the creation of something": *Kieckhefer Container Co.* v. *Unemployment Comp. Co.*, 125 N. J. L. 52, 13 Atl. (2d) 646, 648. (cf. *Quigg* v. *State*, 145 Fla. 431, 199 So. 489, 490; *United States* v. *Elm Springs Farm*, 38 F. Supp. 508, 510-511). This is especially true when the word is used, as it is in the present statute, in close association with such a word as "manufacture": *Thurman* v. *Swisshelm* (C. C. A. 7th) 36 Fed. (2d) 350. A mere retailer is clearly excluded from a statute applying to "manufacturers or producers": *U. S.* v. *Gamble-Skogmo*, (C. C. A. 8th) 91 Fed. (2d) 372.

Since the word "production" in the context of Section 3 is unambiguous, well settled rules of statutory construction preclude resort to Congressional debates or other extrinsic matters to change the meaning of the word: *Dewey* v. *United States*, 178 U. S. 510, 521. But even if

the legislative history were admissible it would emphasize the limited sense in which Congress used the word "production".

Section 3 is simply an amendment of Section 9 of the Selective Training and Service Act, clarifying the power there granted to seize manufacturing plants producing vitally necessary war materials. The President, ostensibly exercising the powers vested in him by Section 9, had (as the table on page 51 of the Petition shows) seized certain properties, every one of which, including the coal mines, was engaged in the *bringing into existence* of materials required for the war effort. The Congressional debates show that Section 3 was intended primarily to remove any doubt as to the statutory validity of these prior seizures (89 Cong. Rec. 3774, 3879) and was intended to apply to plants engaged in the "production of munitions or supplies for the armed forces" (89 Cong. Rec. 3943, 5720). This history is conclusive proof (if any were needed) that Congress never intended Section 3 to authorize the seizure of retail stores.

The Petition seeks to distort the word "production" in Section 3 by attempting to find in Sections 7 and 8 of the Act evidences of a Congressional intention to use the word in other than its ordinary meaning.

Section 8 relates to labor disputes in the plants of "war contractors". The term "war contractor" is expressly given an artificial definition in Section 2 to include those whose plants are "equipped for manufacture, production or mining" even though they have no war contracts. The fact that Sections 8 and 2 have a separate legislative origin from Section 3, and are not *in pari materia*, rebuts any assumption that the implications relating from this specific and artificial definition of "war contractor" necessitates giving an equally artificial definition to the word "produc-

tion" in Section 3 when such an artificial definition is not expressly provided by the statute.

Nor can any weight be given the argument that Section 3 is intended to complement Section 7 by granting a power of seizure as extensive of the jurisdiction of the National War Labor Board. Congress removed from Section 7 all means of enforcing War Labor Board orders judicially, at the express request of the Chairman of the War Labor Board who wanted Board orders to remain "mere declarations of the equities of each industrial dispute * * * without specific legal sanctions": 89 Cong. Rec. 5812. Section 3 was certainly not intended to supply sanctions for Section 7; and hence the two sections are obviously not co-extensive.

The seizure of Wards' retail properties was clearly unauthorized by Section 3 of the War Labor Disputes Act.

IV. The President Had No Inherent Constitutional Power as a Military Commander to Order the Seizure of Wards' Retail Properties.

Under the Constitution different aspects of the war power are specifically conferred upon the Congress and the President. These powers and the relations of the two branches of Government, one to the other, are succinctly summarized in *Ex parte Quirin*, 317 U. S. 1, 25, 26:

> "Congress and the President, like the courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its preamble, is to 'provide for the common Defence,' Art. I, Sec. 8, cl. 1; 'To raise and support Armies,' 'To provide and maintain a Navy,' Art. I, Sec. 8, cls. 12, 13; and 'To make Rules for the Government and Regulation of the land and naval Forces,' Art. I, Sec. 8, cl. 11; and 'To define and punish Piracies and Felonies committed on the high seas, and Offenses against

the Law of Nations,' Art. I, Sec. 8, cl. 10. And finally the Constitution authorizes Congress 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.' Art. I, Sec. 8, cl. 18.

"The Constitution confers on the President the 'executive Power,' Art. II, Sec. 1, cl. 1, and imposes on him the duty to 'take Care that the Laws be faithfully executed.' Art. II, Sec. 3. It makes him the Commander in Chief of the Army and Navy, Art. II, Sec. 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, Sec. 3, cl. 1.

"The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war."

The Petition, as already noted, fails to distinguish between the total "war powers" of the Government and the specific powers conferred upon the President. The Petition seeks, by vague references to the "conditions of modern total war" (p. 15) and to the "circumstances of modern war" (p. 22) to advance a theory which this court has more than once rejected:

"The proposition is this: That in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this

position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law established on such a basis, destroys every guarantee of the Constitution, and effectually renders the military independent of and superior to the civil power. * * * Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."

Ex parte Milligan, 4 Wall. 2, 124; repeated in *Sterling* v. *Constantin*, 287 U. S. 378, 402.

The power of the President as Commander in Chief is strictly military in character and may be used only to do such acts as are required by imperative military necessity: *Fleming* v. *Page*, 9 Howard, 50 U. S. 603, 614.

In the course of actual military operations the President or his subordinate officers may impress private property for the use of the armed forces (*U. S.* v. *Russell*, 13 Wall. 623); or destroy or jettison private property to hinder the advance of the enemy (*U. S.* v. *Pacific Railroad*, 120 U. S. 227); or seize private property to prevent it from falling into the hands of the enemy (*Mitchell* v. *Harmony*, 14 How. 115); or seize enemy property in the course of a blockade (*Prize Cases*, 2 *Black*, 635).

The powers of the President or of subordinate military commanders, however, have been carefully circumscribed by this Court:

"But we are clearly of the opinion that in all these

cases the danger must be immediate and impending, or the necessity urgent for the public service such as will not admit a delay and where the action of a civil authority would be too late in providing the means which the occasion calls for. * * * It is the emergency that gives the right and the emergency must be shown to exist before the taking can be justified."

Mitchell v. *Harmony*, 13 How. 115, 134.

"The public danger must be immediate, imminent, and impending and the emergency in the public service must be extreme and imperative and such as will not admit a delay or resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of the extreme power in respect to the particular property so impressed, appropriated or destroyed."

U S. v. *Russell*, 13 Wall. 623 at page 628.

Summarizing, the power of military action without prior legislative authority can only exist in the face of an immediate emergency of such urgency that resort cannot be had to the legislature or to the courts. The action taken must be directly related to the military necessity. The President and his subordinates can act only when the emergency is "immediate, imminent, and impending" and where it appears that neither the Congress nor the Courts would have any reasonable opportunity to supply a remedy. These elements are totally lacking in the present case. No showing of imminent necessity for the seizure has been made nor does any exist.

No showing has been made that any emergency has so suddenly arisen that resort to Congress or to the courts would not be sufficient. To the contrary the record expressly shows that Wards' non-compliance with War Labor Board orders had continued for more than a year prior to the seizure of its properties During this time the Congress has been almost continuously in session. The

very fact that this suit could be brought in the courts of the United States is conclusive evidence that there is no occasion for invoking martial law through the forceful seizure of Wards' properties by the Army.

V. The Seizure Was Not a Valid Exercise of Any "Combined War Powers" of the President and the Congress.

Apparently on the suggestion of a phrase in *Hirabayashi* v. *United States,* 320 U. S. 81, the Petition argues (p. 23) that the criminal provisions of Section 6 of the War Labor Disputes Act make any seizure deemed necessary by the President "an exercise of the combined war powers of the Congress and the President."

In the *Hirabayashi* case, Congress "ratified and confirmed" a Presidential order already issued and "authorized and implemented" further orders issued by a subordinate military officer, by providing criminal penalties for the violation of such orders (320 U. S. at p. 91). But the Petition seeks to spell out of Section 6 not only a ratification of past action, but a ratification of action not yet taken.

Section 6 of the War Labor Disputes Act merely prohibits strikes and similar interruptions in the operations of plants "in the possession of the United States." It is not limited to plants covered by Section 3 of the War Labor Disputes Act, but covers plants or facilities taken or acquired by virtue of any other federal statute. Since it applies by its wording to many situations where possession is properly acquired by the United States by virtue of express existing laws, any argument that Congress intended by it to ratify other seizures, made without warrant of existing law, is absurd.

Respondents find it difficult to take seriously the further suggestion (Petition, p. 24) that the failure of Congress to amend the War Labor Disputes Act after the prior seiz-

ure of Wards' property of 1944, amounts to a Congressional ratification of future seizures. This argument has no more relevance or persuasiveness than a contrary assertion that the abandonment of the prior seizure before the matter could be decided by the courts was an implied recognition of the illegality of the President's action.

Whether, as a matter of national policy, War Labor Board directives should be made enforceable rather than advisory is not an issue in this case. Consequently, much of the Petition and many of the affidavits should more properly be addressed to the Congress than to the courts. If the decision of the District Court is in any way delaying the solution of the problem of war time labor disputes, the cause is a reluctance to seek a clearer or a better solution from Congress than Congress has heretofore provided.

The Army has retained possession of Wards' property despite the decision of the District Court. The interference with Wards' business continues and the effects of that interference are cumulative. The Petition implies that (p. 15) this interference will continue until this court has finally acted.

Under these circumstances the Respondents are constrained to join in requesting this court to issue a writ of certiorari despite the deep conviction of the Respondents that the decision of the court below was clearly and inescapably correct.

Respectfully submitted,

STUART S. BALL,
JOHN A. BARR,
HAROLD A. SMITH,
GUY A. GLADSON,
ARTHUR D. WELTON,
CHARLES J. CALDERINI,
For Respondents.

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 949

UNITED STATES, PETITIONER

v.

MONTGOMERY WARD & COMPANY, INC., ET AL.

PETITION FOR RECONSIDERATION

It is respectfully prayed that this Court reconsider its order, dated March 12, 1945, which denied the petition for writ of certiorari herein on the ground that the application had been made prior to judgment of the Circuit Court of Appeals for the Seventh Circuit.

The United States submits that for the following reasons it is in the public interest to have this case decided promptly by this Court:

The United States took possession of the plants and facilities of Ward because labor disputes between the company and its employees threatened to interrupt the nation-wide operations of Ward and because the disputes threatened to spread and to interrupt the operations of war plants in such centers of war production as Detroit, Chicago,

636174—45

San Francisco, and St. Paul. Following the decision of the District Court the United States applied for a stay of the District Court's judgment on the ground, among others, that it was necessary for the United States to continue possession and operation of the plants to prevent the resumption of labor disputes that would interfere with the prosecution of the war. The stay was granted and the United States is now in possession of and is now operating the plants and facilities covered by the Executive Order. Unless events occur that cannot now be foreseen, the United States will continue to operate the plants and facilities until this case is finally decided, subject, of course, to the possibility that the stay may be dissolved by a court of competent jurisdiction.

It may be assumed that the Circuit Court of Appeals for the Seventh Circuit will take every possible step to expedite the hearing and the decision of the appeal. Even so, it seems unlikely that this case could be heard and decided by the Circuit Court of Appeals in time to permit a final decision by this Court at this term.[1]

[1] Rule 16 of the Rules of the Circuit Court of Appeals provides that the appellee has 20 days after delivery to him of appellant's brief in which to file a reply. After the entry of the order of this Court on March 12, 1945, counsel for Ward stated informally to counsel for the government that they would not be willing to agree to shorten the time for the filing of briefs. Therefore, unless the Circuit Court of Appeals for the Seventh Circuit should modify or deviate from its own rules, it seems improbable that the case could

If this is so, more than six months must elapse before there can be a decision that finally establishes the rights and obligations of the United States and Ward in this case. The necessity for preserving industrial peace and order in the national war economy is so great that throughout this time it will be the duty of the executive arm of the government to continue the possession and operation of the Ward properties. Ward has taken the position that it will not acquiesce in the government's possession or cooperate with the government in its operation of the plants and facilities until the legal issues involved are decided by the court of last resort. Therefore even if it is assumed that the decision of the lower court is incorrect, nevertheless it will be difficult for the Secretary of War to operate the properties in an efficient and orderly manner so long as the rights of the government have not been established by a decision of the court of last resort. On the other hand, even if it is assumed that the decision of the lower court is correct, the United States, in the interests of preserving industrial peace and preventing interruptions of essential production, must continue to operate the properties until a final decision by this Court even though that course of action may require the United States to invest substantial sums of money in the oper-

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be argued in the Circuit Court of Appeals before the last week of April.

ation of the properties and to incur the risks of substantial liability to Ward. Moreover, although the United States believes that the civilian officials of the War Department and the officers of the Army who are enforcing the Executive Order and operating the properties of Ward are not subject to suits for damages in the event that the Executive Order is held to be illegal, a risk of liability remains which the officials and officers must continue to incur so long as the issues in this case have not been decided by this Court.

The issues in this case raise basic questions as to the scope of the President's power under the War Labor Disputes Act and under the Constitution to take possession of plants and facilities for the purpose of terminating labor disputes that threaten to interrupt the production of the implements of war and other essential economic services. Until these issues are finally decided, the executive arm of the government will be handicapped in its attempts to deal with these interruptions. It is anticipated that the difficulties of the problem and the necessity for dealing promptly with labor disputes will be increased and not diminished by the termination of the war in Europe. It may also be assumed that the Congress will be reluctant to enact clarifying or amendatory legislation so long as the scope of the existing statutes has not been finally decided by this Court and so long as the rights of private

persons under those statutes are the subject of litigation that has not finally been decided by this Court.[2]

The United States believes that the decision below is erroneous and that this error should be corrected. But apart from this consideration, it is important that the issues in this case be finally decided as promptly as possible. If the case is not now reviewed by this Court, the President may be left for a period of six months in doubt as to the scope of his statutory and constitutional powers to deal with economic crises that threaten to interfere with the successful conduct of the war.

Respectfully submitted.

FRANCIS BIDDLE,
Attorney General.

CHARLES FAHY,
Solicitor General.

MARCH 15, 1945.

The foregoing petition is filed in good faith and not for delay.

CHARLES FAHY,
Solicitor General.

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[2] A number of bills to amend the War Labor Disputes Act were introduced in the 78th Congress (see 90 Cong. Rec. 3880, 4122, 4172, 4252) but no action was taken on these bills. One bill to amend section 3 of the War Labor Disputes Act, H. R. 1339, has been introduced in the present session of Congress but no action has been taken on it.

U. S. GOVERNMENT PRINTING OFFICE: 1945